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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND RAY ROBISON,

Defendant and Appellant.

F071955

(Super. Ct. No. BF142506A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

This appeal follows the trial court's denial of defendant Raymond Ray Robison's motion to strike three prior prison term enhancements imposed in this case, brought pursuant to Proposition 47. (Pen. Code, §§ 667.5, subd. (b), 1170.18, subd. (k).)¹ As discussed in further detail below, we issued a decision affirming the trial court on February 24, 2017. (*People v. Robison* (Feb. 24, 2017, F071955 [2017 Cal.App.Unpub. Lexis 1354] [nonpub. opn.] (*Robison III*)).) The matter is now back before us for reconsideration following the California Supreme Court's recent decision in *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*).

I. Background

Defendant was charged in Kern Superior Court case No. BF142506A with six offenses arising out of crimes he committed on or around June 8, 2012, against Guimarra Vineyards.² On July 23, 2012, defendant pled no contest to the allegations that he committed felony grand theft (§ 487, subd. (a)) (count 1), felony receipt of stolen property (§ 496, subd. (a)) (count 2), two counts of petty theft with a qualifying prior conviction (§ 666) (counts 3 & 4), felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) (count 5), and misdemeanor resistance of an officer (§ 148, subd. (a)(1)) (count 6). Defendant also admitted he suffered three prior serious felony convictions within the meaning of the Three Strikes law (§ 667) and he served seven prior prison terms (§ 667.5, subd. (b)).

¹ Further statutory references are to the Penal Code unless otherwise noted.

² We take judicial notice of the record on appeal in our prior nonpublished opinion (*People v. Robison* (Apr. 10, 2014, F067525 [2014 Cal.App.Unpub. Lexis 2562] [nonpub. opn.] (*Robison I*)), both on our own motion and at the parties' request. (Evid. Code, §§ 452, subd. (d)(1), 459; Cal. Rules of Court, rule 8.252(a)(2); *People v. McCarthy* (2016) 244 Cal.App.4th 1096, 1100, fn. 2.)

On August 21, 2012, the trial court granted defendant's request to strike the prior serious felony convictions and imposed the upper term of three years on count 1 and seven consecutive one-year terms for each of the prior prison term enhancements, for a total determinate term of 10 years. Terms on the remaining counts were stayed. The court stayed execution of its sentence and placed defendant on probation upon various terms and conditions.

On March 13, 2013, defendant was arraigned on allegations that he violated the terms and conditions of his probation. At the conclusion of a contested hearing, the trial court found true the allegations that defendant violated the terms of his probation and revoked probation. The court lifted the stay on defendant's sentence and ordered defendant's commitment to prison for 10 years. Defendant appealed and the judgment was affirmed on April 10, 2014, in *Robison I, supra*, 2014 Cal.App.Unpub. Lexis 2562 at *7.

On December 4, 2014, following the enactment of Proposition 47, defendant filed a petition seeking recall and resentencing on counts 1 through 5.³ (§ 1170.18, subd. (a).) On January 21, 2015, the trial court granted his petition as to count 5, but denied it as to counts 1 through 4 on the ground defendant is ineligible for resentencing because the value of the items taken from Guimarra Vineyards exceeded the allowable limit (\$950). (§§ 1170.18, subd. (b), 490.2, subd. (a).) Defendant appealed the denial of his petition as to counts 1 and 2, and that appeal was the subject of *Robison II, supra*, 2017 Cal.App.Unpub. Lexis 1353.⁴

³ We take judicial notice of the record on appeal in defendant's related appeal, resolved in *People v. Robison* (Feb. 24, 2017, F071215 [2017 Cal.App.Unpub. Lexis 1353] [nonpub. opn.] (*Robison II*)), both on our own motion and at the People's request. (Evid. Code, §§ 452, subd. (d)(1), 459; Cal. Rules of Court, rule 8.252(a)(2); *People v. McCarthy, supra*, 244 Cal.App.4th at p. 1100, fn. 2.)

⁴ As set forth herein, we issued separate opinions in *Robison II* and *Robison III* on February 24, 2017.

Separately and subsequent to his first petition in this case for relief under Proposition 47, defendant brought a petition to have three prior felony convictions for which he served prison terms reclassified as misdemeanors pursuant to Proposition 47.⁵ The trial court granted that petition on April 30, 2015. (§ 1170.18, subd. (f).) On June 11, 2015, during the pendency of his appeal in *Robison II*, defendant filed a motion in this case in the trial court requesting dismissal of three of the seven prior prison term enhancements, based on the reclassification of the underlying felonies to misdemeanors. On July 13, 2015, the trial court denied the motion and defendant filed this appeal in *Robison III*, *supra*, 2017 Cal.App.Unpub. Lexis 1354.

In the appeal, defendant challenged the trial court's denial of his motion to dismiss the three prior prison term enhancements and argued the court erred in finding no legal basis for dismissal. The People requested dismissal of the appeal for lack of jurisdiction. They contended that the trial court lacked jurisdiction to consider the motion to dismiss the prior prison term enhancements because, at the time, defendant's earlier appeal of the court's order partially denying his first petition for relief under Proposition 47 was pending in this court. Alternatively, they argued that defendant's motion to dismiss his prior prison term enhancements was untimely and that he lacked entitlement under Proposition 47 to have the enhancements dismissed or stricken.

In *Robison III*, this court addressed the People's jurisdictional argument and agreed it appeared the trial court lacked jurisdiction when it ruled on defendant's motion. (*Robison III*, *supra*, 2017 Cal.App.Unpub. Lexis 1354 at *6.) The court did not resolve the appeal on that ground, however, as it concluded that because Proposition 47 did not

⁵ In briefs filed in the trial court relating to defendant's request for relief from three of the seven prior prison term enhancements, the parties identified the following three Kern Superior Court cases in which defendant's prior felony convictions were reduced to misdemeanors: BF101457A, SC061778A and SC053396A. Although not relevant to our disposition in this case, we note that the criminal complaint filed in this case identifies the first case No. as BF101957A rather than BF101457A.

entitle defendant to the relief he sought in his motion, his claim of error failed on the merits.⁶ (*Robison III*, *supra*, at *6–*7.)

II. Remand After *Buycks*

On May 10, 2017, the California Supreme Court granted review of our opinion in *Robison III* and ordered briefing deferred pending decision in *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900. On July 30, 2018, the Supreme Court decided *Buycks* and, on October 10, 2018, transferred this matter back to this court with the direction to reconsider the decision in *Robison III* in light of *Buycks*. The parties subsequently filed supplemental briefs addressing the impact of *Buycks* on defendant’s motion for relief from the prior prison term enhancements.

In *Buycks*, the California Supreme Court disapproved *People v. Johnson* (2017) 8 Cal.App.5th 111, on which this court relied in *Robison III*, and held that “as to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, ... Proposition 47 and the *Estrada* rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under the measure.”⁷ (*Buycks*, *supra*, 5 Cal.5th at p. 888 & see fn. 12). Thus, under *Buycks*, the previous analysis in *Robison III*, in which this court concluded that defendant was not entitled to relief from his prior prison term enhancements even though the underlying felony convictions had been reduced to misdemeanors under Proposition 47, is no longer valid. (*Buycks*, *supra*, at p. 888.)

⁶ Based on this conclusion, the court did not reach the People’s alternate argument that defendant’s motion was untimely or their request for remand to withdraw from the plea bargain if we determined the trial court erred in denying the motion to dismiss. (*Robison III*, *supra*, 2017 Cal.App.Unpub. Lexis 1354 at *15, fn. 11.)

⁷ *Buycks* interpreted subdivision (k) of section 1170.18, which provides: “A felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.” (See *Buycks*, *supra*, 5 Cal.5th at p. 889.)

However, on reconsideration, we again confront the issue of whether the trial court had jurisdiction over defendant's motion in the first instance given that his appeal of the court's earlier order partially denying his Proposition 47 petition was pending in this court. We now conclude that the trial court lacked jurisdiction and, therefore, this appeal must be dismissed.

DISCUSSION

I. Summary of Proposition 47

As summarized in *Buycks*, “[a]t the November 4, 2014, General Election, California voters approved Proposition 47, the Safe Neighborhoods and Schools Act (Proposition 47). Proposition 47 reclassified as misdemeanors certain offenses that previously were felonies or ‘wobblers.’ It also added Penal Code section 1170.18, which permits those previously convicted of felony offenses that Proposition 47 reduced to misdemeanors to petition to have such felony convictions resentenced or redesignated as misdemeanors. Section 1170.18 allows those currently serving sentences for Proposition 47 eligible felony convictions to petition to have their sentences recalled and be ‘resentenced to a misdemeanor.’ (§ 1170.18, subd. (b).) It also allows those who have already completed their sentences for Proposition 47 eligible felony convictions to petition to have their convictions ‘designated as misdemeanors.’ (§ 1170.18, subd. (f).) Once an offense is resentenced or redesignated as a misdemeanor it ‘shall be considered a misdemeanor for all purposes.’ (Pen. Code, § 1170.18, subd. (k).)”⁸ (*Buycks, supra*, 5 Cal.5th at pp. 870–871, fns. omitted.)

⁸ Section 1170.18 was subsequently amended three times, but those amendments are not relevant to our disposition in this case. (Legis. Counsel's Dig., Assem. Bill No. 2765, approved by Governor, Sept. 28, 2016 (2015-2016 Reg. Sess.) § 1, pp. 1, 3; Legis. Counsel's Dig., Assem. Bill No. 103, approved by Governor, June 27, 2017 (2017-2018 Reg. Sess.) §§ 2, 26, pp. 12, 32–34; Legis. Counsel's Dig., Assem. Bill No. 1516, approved by Governor, Oct. 7, 2017 (2017-2018 Reg. Sess.) § 189, pp. 238–240.)

II. Trial Court's Jurisdiction Over Second Proposition 47 Request

As addressed by this court in *Robison II* and set forth above, after the passage of Proposition 47, defendant filed a petition seeking resentencing on counts 1 through 5. (*Robison II*, *supra*, 2017 Cal.App.Unpub. Lexis 1353 at *2.) After the trial court granted the petition as to count 5 but denied it as to counts 1 through 4, defendant filed an appeal. That appeal was pending when defendant filed the motion seeking dismissal of three of his seven prior prison term enhancements and the People contend that because defendant's first appeal was still pending, the trial court lacked jurisdiction to consider his second request for relief under Proposition 47 in the form of the motion to dismiss the three prior prison term enhancements. In response to the People's jurisdictional argument, defendant concedes "it could be argued that both issues arose from the same record underlying conviction in case BF142506A," but he "suggest[s]" we have jurisdiction over this appeal because the two appeals raised different and unrelated issues. Defendant, however, cites no authority supporting the proposition that, despite the pendency of appeal from the denial of his Proposition 47 petition, the trial court retained jurisdiction to entertain another request for relief under Proposition 47 directed at the same judgment.

Subject to certain exceptions not relevant here (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923–924), "[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur" (*People v. Perez* (1979) 23 Cal.3d 545, 554, citing *People v. Sonoqui* (1934) 1 Cal.2d 364, 367 & *People v. Getty* (1975) 50 Cal.App.3d 101, 107; accord, *People v. Awad* (2015) 238 Cal.App.4th 215, 223; *People v. Saunoa* (2006) 139 Cal.App.4th 870, 872; see § 1265, subd. (a); Cal. Rules of Court, rule 8.272). This rule ""protect[s] the appellate court's jurisdiction by preserving the status quo until the appeal is decided,""" and ""prevents the trial court from rendering an appeal futile by altering the appealed judgment ... by conducting other proceedings that may affect it." [Citation.]"" (*People*

v. Awad, supra, at p. 224, quoting *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1089; accord, *People v. Scarbrough, supra*, at p. 923; *People v. Saunoa, supra*, at p. 872.) After the appellate court resolves the appeal and the time has passed for the Supreme Court to grant review, the appellate court issues “a remittitur to remit the appellate court judgment to the trial court, to divest the appellate court of further jurisdiction, and to transfer jurisdiction back to the trial court.” (*People v. Awad, supra*, at p. 223, citing Cal. Rules of Court, rule 8.272; accord, *People v. Saunoa, supra*, at p. 872.) ““Remittitur transfers jurisdiction back to the inferior court so that it may act upon the case again, consistent with the judgment of the reviewing court.”” (*People v. Awad, supra*, at p. 223, quoting *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 10; accord, *People v. Saunoa, supra*, at p. 872.)

As defendant contends, the appeal in *Robison II* and the appeal in *Robison III* related to separate proceedings in the sense that the first appeal challenged the trial court’s partial denial of defendant’s request to reduce his felony convictions in this case to misdemeanors under Proposition 47 and the second appeal challenged the trial court’s denial of his request to strike three of his prior prison term enhancements following the reduction of the felony convictions on which they were based to misdemeanors under Proposition 47. However, as we recognized in our original opinion, “[t]hat the requests for relief under Proposition 47 targeted different issues is of no consequence: both petitions for relief pertain[ed] to the same underlying criminal case and sentence.” (*Robison III, supra*, 2017 Cal.App.Unpub. Lexis 1354 at *6.)

None of the limited exceptions to divestment of jurisdiction—vacating a void judgment, correcting an unauthorized sentence, correcting clerical errors in the judgment, correcting presentence custody credit calculation errors, recalling a sentence within 120 days for resentencing and filing a petition for writ of habeas corpus—apply here and

defendant does not contend otherwise.⁹ (*People v. Scarbrough*, *supra*, 240 Cal.App.4th at pp. 923–924.) Accordingly, we conclude that defendant’s first appeal of the trial court’s order partially denying his petition for reduction of his felony convictions to misdemeanors under Proposition 47 divested the trial court of jurisdiction to consider his later request for relief under Proposition 47 from three of the seven prior prison term enhancements. The trial court’s order was, therefore, null and void, and this appeal is dismissed without prejudice to defendant seeking relief as may be available in the trial court following the issuance of our remittitur.

DISPOSITION

The appeal is dismissed for lack of jurisdiction.

MEEHAN, J.

WE CONCUR:

LEVY, Acting P.J.

SNAUFFER, J.

⁹ We note that in *People v. Buford* (2016) 4 Cal.App.5th 886, 905, footnote 23, we stated that a pending petition for relief under Proposition 36 does not divest the trial court of jurisdiction over a petition for relief under Proposition 47 because the subject matter of each petition is legally independent from the other. Here, the subject matter of each petition was not legally independent from the other.